



Muite, Sc v United States International University (Miscellaneous Civil Application E211 of 2022) [2025] KEELC 1474 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1474 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION E211 OF 2022
MD MWANGI, J
MARCH 21, 2025
IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16, LAWS OF KENYA
IN THE MATTER OF TAXATION BETWEEN ADVOCATE AND CLIENT**

BETWEEN

PAUL KIBUGI MUIITE, SC ADVOCATE

AND

UNITED STATES INTERNATIONAL UNIVERSITY CLIENT

*(In respect of the chambers summons application dated 8th August 2023
brought under the provisions of Section 1A, 1B and 3A of the Civil
Procedure Act and rule 11 (2) of the Advocates Remuneration Order)*

RULING

Background

1. The application before me is by the Advocate/Applicant, Paul Kibugi Muite, SC. He prays for the following orders:-
 - a. That this Honourable Court be pleased to set aside the whole decision of the Taxing Master delivered on July 26, 2023.
 - b. That this Honourable court be pleased to tax the fees due to the Applicant in respect of the Advocate-Client bill of costs dated September 29, 2022.
 - c. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it and on the affidavit of Paul Kibugi Muite SC, sworn on 8th August 2023. The gist of the application and the supporting affidavit is that the Taxing Master made an erroneous decision in respect of the Advocate - Client bill of costs which



sought the Advocates fees for legal services rendered to the Respondent in Nairobi ELCC 1040 of 2016 where the Advocate/Applicant led the firm of Ndungu Njoroge and Kwach Advocates. The Advocate/Applicant faults the Taxing Master's decision on the following grounds.

- a. Holding that the issue whether Advocate-Client relationship existed between the parties ought not to have been raised through a preliminary objection yet proceeding to hold that a retainer agreement never existed between the Applicant and the Respondent.
- b. Holding that the bill of costs was res judicata in view of the decision in ELC Miscellaneous 12 of 2011.
- c. Holding that she had no jurisdiction to tax the bill of costs on account of rule 60 of the Advocate Remuneration Order for want of a certificate of counsel from the trial court in ELCC 1040 of 2016.
- d. The Senior Counsel's instruction fees as lead counsel were never disallowed by Hon I.N. Barasa on merits.

Response by the Respondent.

3. The application is opposed by the Respondent vide a replying affidavit sworn by its Director in charge of Legal Services, Hellen P. Ambasa sworn on 27th May 2024. The deponent deposes that there was no Advocate-Client relationship between the parties. From the onset of the suit ELCC 1040/2016 (Muthaiga Luxury Homes Limited –vs- USIU-Africa & others), the Respondent instructed the Law Firm of M/S. Nyachae & Ashitiva Advocates who did not engage the services of the Advocate/Applicant as lead counsel. The deponent attached the memo of appearance dated 27th January 2023 to prove her point.
4. The deponent further asserts that the law firm of Ndungu Njoroge & Kwach Advocates who had instructed the Advocate/Applicant herein, only represented the Respondent in ELCC 771 of 2016 and ELCC 840 of 2016 only, from their inception up to 16th September 2016, when the law firm of Nyachae & Ashitiva Advocates took over from them.

Directions by the court.

5. The directions by the court were that the application be canvassed by way of written submissions. Both parties complied and filed their respective submissions. The Advocate/Applicant's submissions are dated 11th October 2024 whereas the Client-Respondent submissions are dated 26th November 2024.
6. On 9th December 2024, parties through their respective Advocates had occasion to highlight the submissions before the court. The proceedings of 9th December 2024 form part of the record of this court and I need not replicate them verbatim in this ruling. Both Advocates agreed that the highlights of the submissions were to apply in this matter as well as in ELC Misc. E212 & 213 of 2022.

Issues for determination

7. A reference to this court is in the nature of an appeal from the decision of the Taxing Master. Rule 11 of the Advocates Remuneration Order requires a party aggrieved by the decision of the Taxing Master to within fourteen (14) days after the decision to give notice in writing to the taxing officer of the items of taxation to which he objects. The taxing officer is on his/her part required to record and forward to the objector the reasons for his/her decision on those items. The objector is then to, within 14 days after receipt of the reasons apply to a judge by way of chambers summons setting out the grounds of his objection.



8. The Advocate/Applicant invites this court to set aside the whole decision of the taxing master delivered on 26th July 2023 and to tax the fees due to him in respect of the Bill of Costs dated 29th September 2022.
9. Taxation of an Advocate – Client bill of costs presupposes the existence of an Advocate-Client relationship. The issues then for this court to decide are:-
 - a. Whether there was an Advocate-Client relationship between the Applicant and the Respondent.
 - b. Whether the Advocate/Applicant has made a case for the setting aside of the decision of the taxing master delivered on 26th July 2023.

Analysis and determination.

10. In the replying affidavit filed on behalf of the Respondent, the deponent explains that the Respondent was involved in three (3) suits, namely;
 - i. ELCC 771/2016 (Maestro Connections Health Systems Limited –vs- United States International University - Africa and 6 others.)
 - ii. ELCC 840/2016 (United States International University - Africa –vs- Maestro Connections Health Systems Limited & 4 others.)
 - iii. ELCC 1040 of 2016 (Muthaiga Luxury Homes Limited –vs- United States International University -Africa & 4 others.)
11. The deponent confirms that in the first two suits, the Respondent was indeed represented by Ndungu Njoroge & Kwach Advocates who had engaged the Applicant as lead counsel. In the 3rd suit however, ELCC 1040 of 2016, the Respondent was from the onset represented by Nyachae and Ashitiva Advocates as confirmed by the memorandum of appearance filed on 2nd September 2016. The law firm of Ndungu Njoroge & Kwach Advocates was not engaged by the Respondent in the suit, ELCC 1040 of 2016. At no time did the law firm of Nyachae and Ashitiva Advocates engage the Applicant as lead counsel.
12. I have keenly read the supporting affidavit by Hon. P.K. Muite, SC sworn on 29th September 2022 in support of the Advocate-Client bill of costs dated 29th September 2022. In the affidavit, particularly at paragraph 2 thereof, Hon. P.K. Muite SC deposes that,

“I was duly instructed to act for the Client in Environment and Land Court Case No. 1040 of 2016; Muthaiga Luxury Homes Limited –vs-United States International University & 5 others with instructions to lead the firm of Ndungu Njoroge & Kwach Advocates in defending the suit instituted against the Client taking all necessary steps to protect the Client’s interests in Nairobi L.R No. 12597/2 situated in Muthaiga North within Nairobi City County.”
13. The correspondence attached includes the letter by P.K. Muite SC, dated 21st July 2016 where he communicates acceptance of instructions to lead subject to agreement on fees. The reference of the letter only mentions two cases; ELCC 771 of 2016 and ELCC 840 of 2016.
14. The 2nd letter annexed to the supporting affidavit is the letter by Ndungu Njoroge & Kwach Advocates dated 3rd August 2016 addressed to the Vice Chancellor of the Respondent University with a copy to Paul Muite SC. The letter confirms that Mr. Paul Muite SC attended court on 2nd August 2016 and requested the court for the consolidation of the two (2) suits. The court acting on the application by



- Paul Muite SC, indeed consolidated the two suits - ELCC 840 of 2016 and ELCC 771 of 2016 with ELCC 840 of 2016 being the lead file.
15. The correspondence attached supports the averments in the replying affidavit by the Respondent. Ndungu Njoroge & Kwach Advocates were only dealing with the two cases. Lead counsel Paul Muite SC too was only instructed to lead the law firm of Ndungu Njoroge & Kwach Advocates in the two suits only, i.e. ELCC 840 of 2016 and ELCC 771 of 2016. He had no such instructions in ELCC 1040 of 2016.
 16. In a nutshell, Paul Muite SC had no instructions whatsoever to offer any services as lead counsel in ELCC 1040 of 2016. He therefore has no basis or justification for claiming any fees since he did not offer any services. He has not offered any evidence to contradict the assertions by the Respondent or to demonstrate that he had instructions to lead the law firm of Nyachae & Ashitiva Advocates, who were and are on record for the Respondent in the case, ELCC 1040 of 2016.
 17. That being the position, there would be no basis for setting aside the decision of the Taxing Master in as far as ELC Misc. E211 of 2022 is concerned.
 18. As I have already stated, the Respondent admits that Ndungu Njoroge & Kwach Advocates indeed represented it in the two suits, i.e. ELCC 840 of 2016 and ELCC 771 of 2016. It is in those two suits that Ndungu, Njoroge & Kwach Advocates instructed Senior Counsel Paul Muite to lead them.
 19. Paul Muite SC accepted the instructions from law firm of Ndungu Njoroge & Kwacha Advocates 'subject to agreement on fees'. The agreement on fees between the Senior Counsel and Ndungu Njoroge & Kwach Advocates has not been disclosed to this court. It is were, we would not be here.
 20. The Advocate –Applicant submits that the Respondent was duly informed of the arrangement between it and Ndungu Njoroge & Kwach Advocates. In their submissions before the Taxing Master dated 17th April 2023, they made reference to an email of 20th July 2016 where the Director in charge of Legal Services and the Company Secretary of the Respondent University communicated to Ndungu Njoroge Advocate confirming having consulted the Vice-Chancellor who had confirmed that he (Ndungu Njoroge) could proceed to initiate discussions with Senior Counsel Paul Muite.
 21. I agree with the Advocate/Applicant from the totality of the evidence before the court and presented before the Taxing Master that the Respondent was aware of and sanctioned the engagement of SC Paul Muite as lead counsel in ELCC 840 of 2016 and 771 of 2016. Ndungu Njoroge and Kwach Advocates further did in fact update the Respondent through the Vice-Chancellor about the participation of SC Paul Muite in the two cases through the letter dated 3rd August 2016, which I referred to earlier on.
 22. The question that begs answer is whether SC Paul Muite, by his appointment as lead counsel by the law firm of Ndungu Njoroge and Kwach Advocates had the right to demand his fees directly from the Respondent.
 23. Guidance on this weighty question is to be found in the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct made in exercise of the powers conferred by Section 4 and 5 of the *Law Society of Kenya Act* and published in Gazette Notice No. 5212 of 26th May, 2017. Under clause 49, the code provides that;

“If an Advocate engages or involves another Advocate in the handling of the matter the responsibility for paying the other Advocate’s fees, and the likely amount of fees or the basis for charging the fees, shall be agreed beforehand with the Client. In the absence of an agreement with the Client that the Client will be directly responsible for paying the fees to



the other Advocate, the instructing Advocate remains responsible for the payment of the fees.”

24. In this instance, the responsibility for payment of the fees for Senior Counsel Paul Muite is on the instructing Advocate(s) – Ndungu Njoroge & Kwach Advocates. It was the responsibility of Ndungu Njoroge & Kwach Advocates to agree with the lead counsel beforehand on the amount of his fees or the basis for charging the fees and who was to pay it. If the Respondent was to pay the fees for the lead counsel, an agreement ought to have been made beforehand.
25. In this court’s considered opinion, the lead counsel does not have the right to demand his fees from the Respondent directly; he may only do so from the instructing Advocate(s) as he had no Advocate-Client relationship with the Respondent.
26. The next issue I should consider is the holding by the taxing master that the references by the Advocate/Applicant were res judicata in view of the decision of Hon. I.N. Barasa in ELC Misc. 12 of 2017 and ELC Misc. 13 of 2017.
27. The Taxing Master in her impugned ruling held that,

“It is this court’s considered opinion that the court in disallowing instruction fees for the lead/senior counsel did so on merit and not on technicality. It would therefore be misguided for this court to proceed and tax the present bill as it will likely result in conflicting decisions emanating from courts of equal and or competent jurisdiction as the decisions in ELC Misc. 12 and 13 of 2017 have never been appealed against nor set aside.”
28. In considering whether the references filed by the Advocate-Applicant are res judicata in view of the decisions in ELC Misc. 12 and 13 of 2017, this court will refer to the Supreme Court of Kenya decision in John Florence Maritime Services Limited and ano –vs- Cabinet Secretary for Transport and Infrastructure and 3 others (2015) eKLR, where the Supreme Court restated the elements before a court may arrive at the conclusion that a matter was res judicata. The elements are:-
 - a. There is a former judgment or order which was final;
 - b. The judgment or order was on merit;
 - c. The judgment or order was rendered by a court having jurisdiction over the subject matter; and
 - d. There must be between the first and the second action identical parties, subject matter and cause of action.”
29. The decision by Hon. I. Barasa was in respect to the Advocate-Client Bills of Costs presented by Ndungu Njoroge & Kwach Advocates against the Respondent herein. In the said bills, the law firm had included an item ‘1(b)’ relating to instructions to engage Senior Counsel (the Advocate-Applicant in this case).
30. The taxing master opined that paragraph 60 (of the Advocates Remuneration Order) provides that in any case that has been conducted or led by Senior Counsel, additional costs shall be allowed if the judge certifies the employment of Senior Counsel was necessary and proper. In the case before her, she observed that the Applicant did not avail a certificate by the judge as provided in paragraph 60 of the Advocates Remuneration Order. For that reason, item 1 (b) was disallowed.



31. The wording of the ruling by Hon. I.N. Barasa did not shut the door for the Applicant in that case. It was not a 'judgement on merits'.
32. A judgment on the merits as defined in the Black's Law Dictionary, 11th Edition is a judgment, 'based on the evidence rather than on technical or procedural grounds – also termed as decision on merits.'
33. The decision by Hon. I.N. Barasa was not on merits as regards item 1(b). I understand it to mean that the instructing Advocates, Ndungu Njoroge & Kwach Advocates, are at liberty to pursue the item '1(b)' in future should they secure the certificate under Rule 60 of the Advocates Remuneration Order. She did not 'tax' that specific item upon finding that the Advocates had not availed a certificate as contemplated under rule 60 of the Advocates Remuneration Order.
34. Though the Taxing Master erred in holding that the references were res judicata, she nevertheless arrived at the right decision that she could not lawfully tax the bill presented by the lead counsel against the Respondent directly. Consequently, I dismiss the references by the Advocate/Applicant.
35. On the issue of costs, considering the peculiar circumstances of this case, I direct that each party shall bear its own costs.
36. For avoidance of any doubts, this ruling applies to ELC Misc. E212 & 213 of 2022.
It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 21ST DAY OF MARCH 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Mwangela h/b for Mr. Gitonga for the Advocate/Applicant

Mr. Ashitiva for the Client/Respondent

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

